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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

In re MATTHEW M., a Person Coming Under
the Juvenile Court Law.

C043736

THE PEOPLE,

(Super. Ct. No.
JD03003)

Plaintiff and Respondent,

v.

MATTHEW M.,

Defendant and Appellant.

Thirteen-year-old Matthew M. (the minor) was charged with one count of arson of an inhabited structure (Pen. Code, § 451, subd. (b) -- count 1), four counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a) -- counts 2, 14, 15, 16), five counts of arson of an uninhabited structure or forest land (Pen. Code, § 451, subd. (c) -- counts 3, 5, 7, 9, 12), six counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b) -- counts 4, 6, 8, 10, 11, 13), and one count of receiving stolen property (Pen. Code, § 496, subd. (a) -- count 17).

Pursuant to a negotiated plea, the minor pled no contest to counts 1, 7, 9, and 16, and the remaining counts were dismissed with a *Harvey* waiver.¹

Committed to the California Youth Authority (CYA) for a maximum period of 12 years, the minor appeals, contending (1) the commitment was an abuse of discretion, (2) the juvenile court erred in finding count 1 (arson of an inhabited structure) was an offense listed in Welfare and Institutions Code section 707, subdivision (b),² and (3) the trial court impermissibly imposed probation conditions when it committed him to CYA. We reject defendant's first two contentions but agree with his third claim. Accordingly, we shall strike the conditions of probation and affirm the order of commitment as modified.

FACTS

From mid-July 2002 through early January 2003, the minor broke into several homes, which were unoccupied at the time. After ransacking, vandalizing, and stealing property from the homes, he set some of them afire. The minor admitted setting the fires and told the probation officer he "wanted to make a name for himself [and] to see something on television that he had done." The damage he caused was estimated to be between \$500,000 and \$1 million.

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

DISCUSSION

I

The minor contends his commitment to CYA was an abuse of discretion for two reasons: (1) he would receive no probable benefit from CYA because he had severe emotional disorders, was unsophisticated, and was only mildly delinquent; and (2) there was no evidence that less restrictive placements would be ineffective or inappropriate. The record does not support the claims.

To justify a CYA commitment there must be evidence in the record demonstrating probable benefit to the minor and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.) A CYA commitment will be reversed only upon a showing that the court abused its discretion in making the commitment. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.)

At the time of disposition, the court had before it written evaluations of the minor by Melinda DiCiro, Psy.D., and Deborah Schmidt, Ph.D., as well as the social study prepared by the probation department.

Dr. DiCiro noted the minor had been raised in an isolated and disruptive atmosphere; he had been impoverished emotionally and materially; his father was rarely present during his upbringing; his mother engaged in bizarre behavior, which affected the minor adversely; he had failed to develop appropriate moral reasoning, social supports, or coping skills;

and he was a failure in school and had few friends. The minor's low self-esteem and severe depression resulted in his developing pyromania -- "setting fires gave him relief from the mounting tension he experienced and an increased sense of power and control." Because of the minor's youth, his pyromania was treatable; however, that treatment should occur in a "locked group home" to insure the safety of the community. At the disposition hearing, Dr. DiCiro admitted she was unaware of any group homes in California that were locked.

Dr. Schmidt generally agreed with Dr. DiCiro's assessment of the minor's dismal upbringing. Dr. Schmidt found the minor suffered from major depression and pyromania as well as from family, peer, and school problems. Dr. Schmidt recommended intensive treatment in a psychiatric group home.

Shon Tamblyn, a mental health assistant and social worker intern for the public defender's office, testified that out of 25 level 13 and 14 group homes he contacted, seven would consider accepting a person with the minor's background.

Dr. Baljit Atwal, a former staff psychologist with CYA, testified CYA had no specific program for treating pyromania. However, CYA had programs for anger management and mentoring.

Thomas Blay, an intake consultant with CYA, testified CYA has specialized counseling and mental health programs; psychologists and psychiatrists are on staff for counseling and prescribing medicine; minors are required to attend school, which is offered year-round; and CYA was willing to accept the minor.

Robert Partlow, the probation officer who prepared the minor's social study, described how sophisticated the minor's offenses were. The minor would knock on a door and if someone answered he would explain his presence by showing the person a picture of a cat, saying he was looking for it. He sometimes used fire-starting equipment to obtain entry into the homes. Once inside, he would place furniture in front of the doors to give him an opportunity to escape if someone came home. Partlow was unaware of any group home in which the minor could be placed that would provide security for society.

In committing the minor to CYA, the court accepted the experts' diagnoses of major depression and pyromania. The court observed that the offenses showed an advanced level of sophistication, demonstrated by the use of the cat picture as a ploy to deflect suspicion and the removal of batteries from smoke detectors to increase the damage. His dangerousness was shown by his committing thefts from the homes, his setting them on fire, and his ransacking and slashing furniture in the process. The court opined that if the minor were "[l]eft to his own devices, [he] will, due to his impulsive, compulsive pyromania, repeat his fire setting[.]" The court noted that the minor was nearly 14 years of age and would be eligible for treatment at CYA's "O. H. Close" facility, which had programs for young offenders. The court concluded that, unlike CYA, none of the group homes are locked, a circumstance that would make it difficult to prevent his escape, thereby placing society at risk.

The minor argues his commitment to CYA was an abuse of discretion because he was an "unsophisticated, mildly delinquent youth" and "mentally disturbed," two categories that the California Supreme Court in *In re Aline D.* (1975) 14 Cal.3d 557 (*Aline D.*) found to be inappropriate for CYA commitment. (*Id.* at pp. 564-565.)

First, *Aline D.* was decided in 1975, prior to the amendments to former section 502 (now section 202), which recognize that punishment and public safety are appropriate factors for consideration of a CYA commitment. (*In re Luisa Z.* (2000) 78 Cal.App.4th 978, 987-988.)

Next, we reject the minor's claim that he is an "unsophisticated, mildly delinquent youth." There was nothing unsophisticated about the minor's selection of the homes he intended to burglarize and set afire or the techniques he used to carry out his crimes. He carried fire-starting equipment and sometimes gained entry by setting a small fire that shattered the glass or melted the plastic on sliding doors. Once inside, he placed furniture in front of doors to obstruct anyone entering, thereby permitting him additional time to escape. Such planning shows sophistication.

Nor were the minor's acts those of a mildly delinquent youth. Upon entering the homes, the minor not only stole property, he also ransacked and vandalized the homes and set them afire for his own excitement. His "delinquency" caused \$500,000 to \$1 million in property damage as well as severe

anguish to his victims, as demonstrated by letters the victims sent to the court.

Finally, intake consultant Thomas Blay made it clear that the minor would be medically and psychologically evaluated at CYA and that CYA had "intensive treatment mental health programs" in which a ward like the minor would be separated from the more delinquent, older youths of CYA's general population. Given these substantial differences, *Aline D.* is of no aid to the minor.

In sum, the severity of the minor's problems, coupled with his obvious danger to society, essentially compelled a CYA commitment. Consequently, the court did not abuse its discretion in making the commitment.

II

The minor contends, and the People concur, that the juvenile court erred when it found arson of an inhabited structure (Pen. Code, § 451, subd. (b)) was an offense listed in Welfare and Institutions Code section 707, subdivision (b). Both parties misconstrue the import of the cited code section.

Welfare and Institutions Code section 707, subdivision (b) sets forth the offenses that, pursuant to section 707, subdivision (c), render a minor presumptively unfit for juvenile court if committed when the minor was 16 years of age or older. Admittedly, the minor was only 13 years old when he committed the violation of Penal Code section 451, subdivision (b). However, the point is immaterial inasmuch as Welfare and Institutions Code section 707 relates to fitness hearings, not

commitments to CYA. (*In re Tino V.* (2002) 101 Cal.App.4th 510, 513 (*Tino v.*)). The minor's fitness for juvenile court never was and is not now at issue.

What is at issue is the age at which CYA must discharge a ward committed to its custody. The court found that the minor's maximum period of confinement was 12 years. Generally, CYA must discharge a ward after either two years of control or attainment of the ward's 21st birthday, whichever occurs later. (§ 1769, subd. (a).) However, if the committing offense is one listed in section 707, subdivision (b), CYA may maintain control over the ward until he or she attains 25 years of age. (§ 1769, subd. (b).)³

The reference in section 1769, subdivision (b) to the offenses in section 707, subdivision (b) is intended "to designate the offenses that trigger extended commitments." (*Tino V.*, *supra*, 101 Cal.App.4th at p. 513; Cal. Rules of Court, rule 1494(c) ["Order of commitment to the Youth Authority shall specify if the offense is one listed in section 707(b)"].)

³ Section 1769, subdivision (b) provides: "Every person committed to the Department of the Youth Authority by a juvenile court who has been found to be a person described in Section 602 by reason of the violation of any of the offenses listed in subdivision (b), paragraph (2) of subdivision (d), or subdivision (e) of Section 707, shall be discharged upon the expiration of a two-year period of control or when the person reaches his or her 25th birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800)."

Welfare and Institutions Code section 707, subdivision (b)(2) lists, as an offense, "Arson, as provided in subdivision (a) or (b) of Section 451 of the Penal Code." Consequently, the juvenile court properly designated the arson of an inhabited structure, a violation of Penal Code section 451, subdivision (b), as an offense listed in Welfare and Institutions Code section 707, subdivision (b).

III

The minor contends, and the People concede, that the juvenile court improperly imposed probationary conditions upon the minor when it committed him to CYA. We accept the People's concession.

"[T]he imposition of probationary conditions constitutes an impermissible attempt by the juvenile court to be a secondary body governing the minor's rehabilitation." (*In re Allen N.* (2000) 84 Cal.App.4th 513, 516.)

The juvenile court imposed the following conditions that we shall order stricken: that he advise probation of his place of residence or any change of residence upon his release; that upon his release he obey all laws and reasonable orders of the probation officer and lawful custodian; that he attend school; that he submit his person, property, and place of residence to search by probation or a peace officer at any time with or without a warrant; that he not possess any weapons or items that could be used to set fires; that he not use or possess any alcohol or drugs unless prescribed by a physician; that he not be any place where alcohol is the main item for sale; that he

observe a 6:00 o'clock curfew; and that any conversation between him and his mother be monitored.

DISPOSITION

The probationary conditions cited in part III of this opinion are stricken. The juvenile court is directed to amend its records accordingly and to forward an amended copy of the commitment order to the Director of the Youth Authority. In all other respects, the order of commitment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.